In the Supreme Court of the United States

OCTOBER TERM, 1979

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

WNCN LISTENERS GUILD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

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1. Respondents[1] fail to come to grips with our contention that nothing in the Communications Act of 1934 compels the Commission to review entertainment format changes on an ad hoc basis whenever listeners "grumble" about the loss of an allegedly unique format. The general "public interest" standard that the Commission applies when considering license transfers and renewals does not, on its face, require this kind of governmental intrusion, and respondents refer to no other statutory standard that does.

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[1]Respondents WNCN Listeners Guild, et al. and Office of Communication of the United Church of Christ, et al. are referred to hereinafter as "WNCN" and "UCC."

Although respondents protest that the Commission has "relegat[ed] the public interest determination to the marketplace" (WNCN Op. 26; UCC Op. 26), the Commission has determined that, in the case of entertainment programming, the public interest is best served by the free functioning of competition in all cases, rather than by government intervention in those instances when listeners allege that entertainment formats are "unique." This is not an abandonment of the obligation to determine what is in the public interest when licenses are renewed or transferred. To the contrary, the Commission has reasonably concluded that interjection of entertainment format controversies into licensing hearings will retard rather than advance the public interest objectives of the statute.[2]

Apparently recognizing that the court of appeals' "format doctrine" cannot rest on the plain meaning of the provisions of the Act, respondents quote from opinions of this Court that refer generally to the Commission's regulatory authority over radio communications. But none of those opinions considers entertainment format changes, or issues that are remotely related. To the extent that the cases relied on by respondents have any relevance here, they support the Commission's exercise of administrative discretion and demonstrate the errors in the analysis of the court of appeals. For example, *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 215-216 (1943), affirmed the Commission's discretion to adopt chain broadcasting regulations designed to enhance competition among broadcasters and

[2]Simply stated, the statutory goal of maximizing listener welfare would be undermined if the Commission were forced to sacrifice an essential public interest objective licensee programming discretion in pursuit of "ideal" diversity.

to minimize restraints of trade. The Court warned that judges should not assert their "personal views regarding the effective utilization of radio" in derogation of the agency's administrative responsibilities (319 U.S. at 218-219), and added that " '[w]e certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission' " (319 U.S. at 224)—precepts that the court of appeals ignored here.

Similarly, in *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 94 (1953), a case considering common carrier entry requirements, the Court recognized that a Commission determination resting on its expert "evaluation of the needs of the industry" would be entitled to judicial deference. Although the Court concluded that the Commission inadequately explicated the basis for its decision in that case, it stressed that the Commission's action would be upheld if the Commission found that "competition would serve some beneficial purpose such as maintaining good service or improving it" (346 U.S. at 97). In the present case, the Commission reached that very conclusion based on an extensive administrative record and a fuliy articulated analysis of the issues presented (Pet. App. 117a-196a).

2. Respondents also argue that the Commission's Policy Statement disagrees with its past interpretations and represents an "abrupt change" in policy (UCC Op. 9). That assertion is wholly inaccurate.[3] Since its

[3]The 1928 and 1929 Reports of the Federal Radio Commission relied on by respondents (UCC Op. 6-7) are anachronisms from a period when there were few radio stations and large areas of the country received one radio signal at most. At that time, even the broadcast of phonograph records was thought by the Radio Commission to be a waste of scarce broadcast resources. See 2

formation, the Commission has never required renewal or transfer applicants to justify abandonment of allegedly unique entertainment formats—except in recent years when compelled to so do by the D.C. Circuit.[4] The Commission has uniformly avoided value judgments on the content of entertainment programs. See, *e.g.*, *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2308-2309 (1960) ("the Commission in administering the Act and the courts in interpreting it have consistently maintained that responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee, and that the fulfillment of the public interest requires the free exercise of his independent judgment").[5]

Federal Radio Commission *Annual Report* 168 (1928). Needless to say, conditions and public attitudes have changed dramatically since then. These early efforts at defining the public interest are hardly binding on the Federal Communications Commission today.

[4]We wish to emphasize that the Commission's Policy Statement does not govern *informational* programming (*i.e.*, news and public affairs broadcasts) for listeners whose primary or only language is other than English. See Pet. App. 187a-188a. Different Commission rules require licensees to ascertain and meet the informational needs of substantial minority groups within their listening audiences. See, *e.g.*, *Ascertainment of Community Problems*, 57 F.C.C. 418, 438-439 (1976); *Stone* v. *FCC*, 466 F. 2d 316, 327-329 (D.C. Cir. 1972). There is no basis for the assertion (UCC Op. 18 n. 16) that any particular entertainment format is essential for a station to be able to satisfy its informational programming obligations.

[5]As the Commission demonstrated in its brief in the court of appeals (pages 35-37), the legislative history of the Communications Act and its predecessor, the Radio Act of 1927, shows a general congressional intent to avoid requiring the Commission to establish public interest priorities for different format types. Contrary to the assertion of respondents (UCC Op. 29-31), the legislative history of Section 307(c) of the Act, 47 U.S.C. 307(c), and its administrative interpretation, demonstrate that neither Congress nor the Commission believed it to be in the public interest for the Commission to

3. Respondents also refuse to face the inevitable impact of the court of appeals' format doctrine on First Amendment values. Under the format doctrine, the Commission will be forced to render content-based value judgments about what type of entertainment programs should be broadcast.[6] Respondents disingenuously suggest (UCC Op. 33; WNCN Op. 26-30) that the Commission need only hold a "hearing" and then consider a wide range of "remedies." But there is no such easy escape: if the "hearing" establishes that the format in question is unique and financially viable, the "remedy" is perpetuation of the format. In past cases, the D.C. Circuit has been frank to acknowledge that it is "axiomatic" that the format's "preservation * * * is generally in the public interest." *Citizens Committee to Save WEFM* v. *FCC*, 506 F. 2d 246, 268 (D.C. Cir. 1974). Nothing in the opinion below disavows the court's continuing commitment to that viewpoint. Moreover, as the Commission expressly found (Pet. App. 183a-184a), the prospect of governmental "hearings" to review

impose particular formats on unwilling radio stations, including seemingly desirable formats such as non-profit or educational formats. See Report of the Federal Communications Commission to Congress Pursuant to Section 307(c) of the Communications Act of 1934 (1935).

[6]We fail to perceive the asserted disparity (UCC Op. 39-40) between our position and that of the private petitioners on the First Amendment issue in this case. Our constitutional objection to the court of appeals' format doctrine goes to the heart of the requirement that it imposes, not simply to the details of implementation (see Pet. 23-25). A proper interpretation of the Communications Act, with appropriate deference to First Amendment values, would avoid unnecessary conflicts between the Act and the Constitution.

proposed format changes whenever listeners "grumble" will chill format experimentation and deprive the public of the benefits of innovation, in contravention of statutory and First Amendment values.[7]

4. Although respondents argue (WNCN Op. 36) that the absence of a conflict among the circuits militates against review by this Court at this time, the exclusive jurisdiction of the D.C. Circuit over licensing controversies means that there will never be a conflict among the circuits or a future opportunity for the Commission to obtain review of the clash between its Policy Statement and the court of appeals' interpretation of the Act. In future format cases, the Commission will be required to implement and defend the court's format policy, not its own.[8]

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[7]Contrary to the argument of respondents (WNCN Op. 35-36), the practical significance of the decision below cannot be measured by the limited number of format cases that have gone to hearing or have been litigated on appeal. The prospect of protracted and financially burdensome litigation commenced by listener groups — litigation invited by the court of appeals' decision — will inevitably chill the incentive to alter entertainment programming and lead broadcasters to settle controversies before protesting groups complain to the Commission.

[8]Even if there were merit to respondents' claim of procedural irregularity (WNCN Op. 31-35) — which there is not (see Pet. 14 n.7) — that would not be a ground for denying review. The court of appeals considered and rejected the Commission's Policy Statement on its merits, not on procedural grounds (see Pet. 2 n.1). The court's decision prevents the Commission from repairing any alleged procedural defect, since it forecloses the adoption of the Policy Statement under any circumstances.

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1980